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CASE # 00-1260

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

CORRECTED COPY

MARK JAMES KNIGHTS,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ISSUE PRESENTED FOR REVIEW

1. May police conducting a criminal investigation rely upon the imposition of a probation search condition to conduct a warrantless search of a probationer's residence?

STATEMENT OF THE CASE

A. Procedural Background

On June 3, 1998, Respondent was arrested and taken into custody by state law enforcement officers following the search of his home. Pet. 3. On June 19, 1998, the Napa Municipal Court conducted a preliminary examination, and on July 2, 1998, a felony Information was filed in Napa Superior Court charging Respondent with possession of a destructive device, possession of ingredients to make a destructive device, possession of ammunition, possession of stolen property, and possession of smoking device. C.A. S.E.R. 4-8.[1] Respondent was released on bail, and a jury trial was scheduled for Aug 31, 1998. *Id.* at 9, 15. The trial date was subsequently continued until February 16, 1999. *Id.* at 11-13, 19.

Nine months into these state court proceedings, a federal complaint was filed against Respondent in the Northern District of California charging the identical conduct as a violation of federal law. Respondent was arrested and taken into federal custody. On April 6, 1999, an indictment was filed charging the Respondent and a co-defendant with one count of conspiracy to commit arson and charging the Respondent with one count of unlawful possession of ammunition.

In federal court, the Respondent filed a motion to suppress evidence seized during a warrantless search of his residence. The district court held an evidentiary hearing and in an oral order granted the motion to suppress with respect to one of the two searches challenged by the Respondent. Pet. App. 5a. The government timely appealed.

[1] Throughout this memorandum, "C.A. E.R." refers to Respondent's Excerpts of Record filed with the court of appeals; "C.A. S.E.R." refers to Respondent's Supplemental Excerpts of Record; and "C.R." refers to the trial court docket sheet.

B. Statement of Facts

On June 1, 1998, a Pacific Gas & Electric (PG&E) power transformer and adjacent Pacific Bell telecommunications vault in Napa, California, were pried open and set on fire. Although there were no witnesses to the vandalism, Respondent and an associate were suspected, based on an ongoing investigation Napa law enforcement officers had been conducting for approximately two years into a series of arsons in the area. Pet. App. 2a-3a. At 8:00 a.m. on June 3, 1998, nine local law enforcement officers broke down the door of the Respondent's apartment building and conducted a warrantless search of his apartment. Pet. App. 4a.

On the day before the search, Napa County Sheriff Department Detective Todd Hancock prepared an "operation order" describing the basis for his belief that Respondent had participated in the recent arson and seeking permission to have other officers help with the search. Pet. App. 3a-4a, 32a-33a; C.A. S.E.R. 1-3. Law enforcement officers surveilled the Respondent's apartment for approximately eight hours before the search. Pet. App. 3a-4a. In the hours immediately preceding the search, Detective Hancock gathered staff for the search, briefed them on the situation, and made preparations for the search.

During this time, Detective Hancock did not obtain a warrant to search the Respondent's apartment. Pet. App. 4a. Instead, Detective Hancock reviewed records in the Sheriff's Department and determined that the Respondent was on probation and was subject to a search condition. *Id.*; C.A. E.R. 126. Detective Hancock relied on the existence of this search clause to search the Respondent's apartment instead of seeking a search warrant. Detective Hancock did not make any effort to contact the probation office or the sentencing judge before the search. No probation officer accompanied the officers who searched the Respondent's apartment, nor was any probation officer informed of the impending search.[2] Pet. App. 10a.

Respondent had been placed on summary probation on May 29, 1998, as a result of his

[2] The Respondent was on summary probation and did not have a probation officer assigned to him. Pet. App. 4a.

conviction for a misdemeanor drug offense. Pet. 2. There is no evidence that this conviction was pursuant to a negotiated disposition. The only evidence regarding the search condition is contained in the Napa County Probation Order, dated May 29, 1998, which Respondent signed after he had already sustained a conviction. The form states that the Defendant, "having been convicted" of a misdemeanor violation, is "hereby ordered to a term of probation." C.A. E.R. 73. Possible terms and conditions are listed, with a box to check beside each one. There is a check in the box next to the search condition, which requires the Defendant to "[s]ubmit his/her . . . place of residence . . . to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." *Id.* The Defendant's signature appears as acknowledgment that he has received a copy of these conditions and "agree[s] to abide by same." *Id.*

The officers searched the Respondent's apartment for approximately 1 ½ hours. C.A. E.R. 128. Following the search, the Respondent was arrested. Later on the day of the search of the Respondent's apartment, Detective Hancock swore out an affidavit for a search warrant to search the co-defendant's truck. Pet. App. 22a-23a. The warrant was issued, and the truck was searched the same day. Pet. App. 4a.

Nine months later, federal authorities intervened and the case was re-filed in federal court. Respondent moved to suppress all evidence seized during the warrantless search of his apartment on grounds that the search conducted by state officers was not valid under federal law. Pet. App. 5a. Respondent argued that the search was not a valid probation search but rather had been styled as such by law enforcement as a means of evading the Fourth Amendment's warrant requirement.[3] The government argued several different theories in response, among them the contention that the Respondent had consented to the search through the waiver of Fourth Amendment rights as a condition of probation. Pet. App. 5a.

After an evidentiary hearing, the district court granted the Respondent's motion to suppress

[3] Respondent also contended that the officers did not have the reasonable suspicion necessary to conduct a probation search. This argument was rejected and is not at issue here. Pet. App. 10a.

all evidence seized in the June 3, 1998, search. Pet. App. 37a. The court ruled that acceptance of a probation search condition does not eliminate all of a probationer's Fourth Amendment rights. *Id.* at 24a-25a. Relying on "longstanding clearly delineated case law in the Ninth Circuit regarding the standard governing probation searches," the district court concluded that the warrantless search of the Respondent's apartment violated the Fourth Amendment because it was an investigatory search, not a valid probation search. *Id.* at 31a 35a, 37a. To determine whether or not the search was undertaken to advance the goals of probation, rather than to further an independent criminal investigation, the court examined the record of events leading up to the search. After carefully reviewing the record, the district court found that "the weight of the objective evidence supports a finding that a search here was undertaken for purposes of fostering the investigation of Mr. Knights' involvement in the possession and manufacture of incendiary devices primary [sic] to obtain evidence toward a criminal investigation for arson or manufacture of those same incendiary devices." *Id.* at 33a.

The court of appeals affirmed. The court acknowledged that an individual may consent to a search and, noting that Respondent here did so consent, the court relied upon numerous precedents which established that the consent "must be seen as limited to probation searches, and must stop short of investigation searches." Pet. App. 6a-8a; *see also id.* at 9a (noting long line of cases). Turning to the facts of this case, the court echoed the district court's conclusion that the search was indisputably an investigatory search, conducted by law enforcement as part of an ongoing criminal investigation. The court considered, and rejected, the government's contention that the decision in *Whren v. United States*, 517 U.S. 806 (1996), undermined Ninth Circuit precedents. The court noted that in *Whren* this Court held that an officer's subjective intentions will not invalidate a search supported by probable cause; the ruling did not address a search for which there was no probable cause but only the probationer's consent to a search condition. Pet. App. 11a. In response to the government's expressed concern about the discrepancy between state and federal law, the court declined to modify federal law to accommodate California, noting that "[f]or at least three decades, it

has been the law of this circuit that subterfuge probation searches are unconstitutional." *Id.* at 12a-13a.

REASONS FOR DENYING THE PETITION

1. Petitioner's Central Argument Was Not Raised in the Court of Appeals and is Not Supported by the Factual Record.

Petitioner contends that the warrantless search was lawful because it was based on Respondent's consent. Petitioner's central argument is that a probationer may lawfully choose to accept a search condition which subjects him or her to warrantless, suspicionless searches, in exchange for the avoidance of a prison term. Thus in section 2.a., Petitioner reviews cases demonstrating that a criminal defendant may waive constitutional protections pursuant to a plea agreement. *See* Pet. 12 ("an individual may . . enter into arrangements with the government under which the individual relinquishes constitutional rights in return for a promise of favorable treatment"); *id.* at 13 ("the government may attempt through negotiation to persuade a defendant to plead guilty to a criminal charge"); *id.* ("the government may encourage a guilty plea by offering substantial benefits in return for the plea"); *id.* at 14 (if Respondent could have entered plea agreement providing for prison sentence, "there is no reason that he could not also bargain for a less onerous punishment"). At section 2.b., Petitioner addresses this Court's "unconstitutional conditions" jurisprudence. *Id.* at 15 (search condition not unlawful because it is "reasonably related to the benefit offered by the government as a quid pro quo"). At section 2.c., Petitioner states that "it has been suggested" that a probationer's consent to a search term is not truly voluntary and Petitioner seeks to prove the opposite. *Id.* Petitioner here relies again on precedents upholding the voluntariness of a plea entered into to avoid a greater punishment. *See id.* (consent not rendered involuntary by fact that "the alternative is incarceration"); *id.* at 16 (consent not unlawfully coerced because government "present[s] . . . choice in which one of the alternatives is plainly more advantageous than the other").

This Court should decline the petition for two reasons. First, Petitioner failed to present any of

these arguments to the court of appeals. That court thus had no opportunity to pass upon the merits of these claims. Second, the record is devoid of any factual basis to support petitioner's argument. There is no evidence that Respondent agreed to accept a search condition pursuant to a negotiated plea, or that he consented to this condition in exchange for any benefit. There is no evidence whatsoever of any negotiations between Respondent and the government. There is no evidence that the government ever presented Respondent with a choice, either before he pleaded guilty or before he was sentenced, between probation and incarceration. Nor is there any indication that the state court apprised Respondent that this condition would be a consequence of his guilty plea, nor that the court, prior to imposing sentence, informed Respondent that he could choose between accepting probation and the search condition, or going to prison. In short, there is no evidence that Respondent accepted this probation condition in exchange for any benefit at all.

Petitioner's theory, which relies upon an analysis of this probation search condition as if it were an element of a contract or "bargain" between Respondent and the government, is thus wholly unsupported by the facts of this case. Pet. 14.

2. The Court of Appeals' Decision is Consistent With the Precedent of Virtually Every Other Circuit in the Country.

Petitioner contends that the court of appeals' decision is in conflict with California law, as set forth in *People v. Woods*, 981 P.2d 1019 (Cal. 1999), *cert. denied*, 529 U.S. 1023 (2000), and urges this Court to overrule established Ninth Circuit law in favor of the position attributed to the California Supreme Court. Petitioner fails to acknowledge that the court of appeals' decision in this case is consistent with the precedent of every other federal court of appeals. Petitioner similarly ignores the fact that not a single federal court has adopted the California Supreme Court's questionable holding that a probationer who is subject to a search condition has, by that fact alone, agreed to submit to any search of his person or residence, by any law enforcement officer, for any law enforcement purpose.

Federal courts do not rely on a probationer's consent as the legal authority which authorizes warrantless searches of a probationer because this Court long ago abandoned the outdated view of

probation, or parole, as a privilege which a probationer obtains in exchange for a waiver of fundamental constitutional protections. *See Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (rejecting "right/privilege" distinction; declining to apply consent or waiver theory to justify limitations on liberty of parolee); *Griffin v. Wisconsin*, 483 U.S. 868, 872 (1987) (holding that "special needs" of probation system provide basis for state's limited intrusions on probationer's Fourth Amendment rights). In *Griffin*, this Court held that operation of a state's probation system presents the type of "special needs, beyond the normal need for law enforcement, [which] make the warrant and probable-cause requirement impracticable." *Griffin*, 483 U.S. at 873 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985)). Probation searches thus have been included within the larger category of inspection and regulatory searches, all of which share the assumption that the problems to which they are addressed could not be adequately dealt with under the usual Fourth Amendment restraints and that consequently the practices must be judged by somewhat different standards. *See, e.g.,Chandler v. Miller*, 520 U.S. 305 (1997); *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Michigan v. Tyler*, 436 U.S. 499 (1978); *Camara v. Municipal Court*, 387 U.S. 523 (1967). In these "exceptional circumstances," the court has employed a careful balancing that weighs "the intrusion on the individual's interest in privacy against the 'special needs' that support[] the program." *Ferguson v. Charleston*, ___ U.S. ___, 2001 WL 273220 (March 21, 2001).

This Court's reasoning in *Griffin* is premised in large part upon the distinction between probation officers and police officers. *Griffin*, 483 U.S. at 876 ("Although a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen.").[4] As part of his or her special relationship with the probation, the probation officer

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[4] In the related context of parole supervision, this Court recently reiterated the special role played by a parole agent:

> Parole agents, in contrast to police officers, are not "engaged in the often competitive enterprise of ferreting out crime," *United States v. Leon*, 468 U.S., 897, 914 (1984); instead, their primary concern is whether their parolees should remain free on parole. Thus, their relationship with parolees is more supervisory than adversarial.

is "supposed to have in mind the welfare of the probationer." *Id.* Thus, although the probation officer has a supervisory relationship with the probationer, the relationship is not entirely adversarial. *Id.* at 879. Because the probation officer occupies a space between police officer and impartial magistrate, and because the probation officer works for the welfare of the probationer and not in an entirely adversarial relationship, the Court concluded that probation searches present the exceptional circumstances which permit waiver of the Fourth Amendment's requirements of a warrant issued upon probable cause.

In the wake of *Morrissey* and *Griffin*, virtually every circuit has held that, regardless of the language of the search condition or waiver, a warrantless probation search is lawful only to the degree that it is actually a true probation search, conducted for probation purposes. Regardless of the variations in the particular tests applied, the federal courts that have considered this issue are unanimous in their view that police conducting a criminal investigation may not use a probation search condition as subterfuge for avoiding the Fourth Amendment's warrant requirement. *See, e.g. United States v. Giannetta*, 909 F.2d 571, 581 (1st Cir. 1990) (search must be for probationary purpose; probation officer may not be used by police to circumvent the Fourth Amendment's warrant requirement); *United States v. Hill*, 967 F.2d 902 (3d Cir. 1992) (parole officer's search authority stems from the parole system's "special needs"; search upheld where no evidence that parole agents acted on behalf of the police); *United States v. Martin*, 25 F.3d 293, 296 (6th Cir. 1994) (probation search may not serve as subterfuge for criminal investigation; search upheld where no evidence that probation officer was used to help police evade the warrant requirement); *United States v. Coleman*,

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Pennsylvania Bd. of Probation & Parole v. Scott, 524 U.S. 357, 368 (1998) (citing *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987)). The Court also recognized that a police officer cannot be expected to have the goals of the probation officer foremost in mind:

> Where the person conducting the search is a police officer, the officer's focus *is not upon ensuring compliance with parole conditions* or obtaining evidence for introduction at administrative proceedings, but upon obtaining convictions of those who commit crimes.

Id. (emphasis added).

22 F.3d 126, 129 (7th Cir. 1994) (police may not use probation search condition to evade warrant requirement); *United States v. Vincent*, 167 F.3d 428, 431 (8th Cir.) (search condition which fails to incorporate requirement of reasonable suspicion overbroad; finding search valid because probation officer's conduct complied with Fourth Amendment's reasonableness requirement) *cert. denied*, 528 U.S. 848 (1999); *United States v. McFarland*, 116 F.3d 316, 318 (8th Cir. 1997) (parole officer may not serve as "stalking horse" for the police); *United States v. Cantley*, 130 F.3d 1371, 1376 (10th Cir. 1997) (parole search must be done for parole purpose and not to evade the Fourth Amendment's warrant requirement); *United States v. Lewis*, 71 F.3d 358, 362 (10th Cir. 1995) (under *Griffin*, special needs of parole system allow for exception to Fourth Amendment's warrant requirement).

In the years since *Griffin*, most circuits have applied some variation of the "reasonable suspicion" standard to warrantless searches conducted under a probation search condition. *See, e.g.*, *Vincent*, 167 F.3d at 431. No circuit has ruled that a probation officer's ability to conduct warrantless probation searches is contingent upon a probationer's consent; nor has any circuit applied a waiver or consent theory to determine the permissible scope of a probation search.

3. The Perceived Conflict Between Federal Law and California Law May Shortly be Resolved; Recent Decisions From the California Supreme Court Indicate that the Court May Soon Follow The Path of the Federal Courts and Abandon the "Consent" Rationale Altogether.

The Petitioner suggests to this Court that, under California law, a probationer who is subject to a search condition, has, by that fact alone, agreed without qualification to submit to any search of his person or residence. Petitioner urges the Court to adopt this unequivocal interpretation of the consent-to-search clause in order to resolve the current conflict between state and federal law in California. Pet. 9. The Court should reject Petitioner's invitation.

As a preliminary matter, Petitioner is incorrect in the characterization of California law as endorsing an unequivocal blanket waiver. Even the California Supreme Court has not interpreted a probationer's consent to a search condition as an advance waiver of *all* Fourth Amendment rights, nor as a consent to any and all searches. Rather, that court has recognized that, regardless of the language of the waiver, a probationer may nonetheless challenge a search which is carried out in an

unreasonable manner or conducted in order to harass the probationer. *People v. Bravo*, 738 P.2d 336, 340 (Cal. 1987). A search is similarly subject to challenge in California if the probationer demonstrates that the search was not undertaken for a rehabilitative goal or a legitimate law enforcement purpose. *Id.*; *cf. People v. Reyes*, 968 P.2d 445, 451 (Cal. 1998) (parole search subject to challenge as "arbitrary and capricious when the motivation for the search is unrelated to rehabilitative, reformative or legitimate law enforcement purposes or when the search is motivated by animosity toward the parolee" on the part of law enforcement), *cert. denied*, 526 U.S. 1092 (1999). Thus even under California law, a probationer's consent to search is afforded a more nuanced interpretation than the Petitioner suggests. The focus of the California inquiry, moreover, turns in large part on the difficult question of whether the searching officers, in executing a probation search, acted with an improper motive.

The central reason for this Court to stay its hand, however, is the fact that the apparent conflict may shortly resolve itself without federal intervention. California's jurisprudence regarding the permissible bounds of a probation search has continued to evolve over the last few decades and two recent opinions suggest that the Court is currently questioning the continued vitality of the "consent" rationale for probation searches. *See Reyes*, 968 P.2d at 453-62 (Kennard, J., dissenting); *Woods*, 981 P.2d at 1029-38 (Brown, J., dissenting). Because the government's petition fails to address the unsettled state of California law, Respondent provides the following brief review of the essential developments.

California first adopted the consent rationale as a basis for waiver of a probationer's Fourth Amendment rights in *People v. Mason*, 488 P.2d 630 (Cal. 1971), *disapproved on other grounds*, *People v. Lent*, 541 P.2d 545 (Cal. 1975). The majority opinion in *Mason* ruled that the courts have broad discretion with respect to the imposition of conditions of probation; if the probationer considers the conditions too harsh, he or she may choose to go to jail instead. In 1981, in *United States v. Cordova*, 650 F.2d 189 (9th Cir. 1981) (per curiam), the dissent noted the apparent Fourth Amendment problems with California's unlimited search condition, arguing that the advance waiver

theory the court had relied upon in *Mason* had since been thrown into question both by the Supreme Court and by the Ninth Circuit. *Id.* at 191-92.[5] In 1986, the California Supreme Court announced that parolees -- as opposed to probationers -- could not be subject to search absent reasonable suspicion of criminal activity or a parole violation, a new rule which brought California law more in line with federal law. *People v. Burgener*, 714 P.2d 1251 (Cal. 1986). In 1987, however, in a case involving a probation search condition, the court relied on *Mason* for the holding that a probationer who consents to a search condition has waived Fourth Amendment rights and may be subject to search without a requirement of reasonable suspicion and for either probationary or law enforcement purposes. *Bravo*, 738 P.2d at 340. The court thus created a two-tiered system, under which parolees have greater Fourth Amendment protections than probationers.

The unusual scheme created by *Bravo* and *Burgener* persisted for eleven years. Then in 1998, in *People v. Reyes*, 968 P.2d at 452-53, a bare majority of the court overruled *Burgener* and held that a warrantless parole search need not be based on reasonable suspicion. The court could not rely on the consent exception to the warrant requirement to validate the search of an adult parolee because, under California's Determinate Sentencing Act of 1976, parole is not a matter of choice. *Id.* The court therefore resorted instead to a balancing test, relying on the "special needs" line of cases, and concluded that a search conducted pursuant to a proper probation condition does not impinge any privacy right that society is prepared to recognize. *Id.* at 451. The three dissenting justices strongly disagreed. *Id.* at 756-70 (Kennard, Werdegar, & Mosk, J.J., dissenting). Criticizing the Court's decision to eliminate the "reasonable suspicion" requirement, Justice Kennard emphasized the growing divergence between California's precedents and the views of "the vast majority of jurisdictions that have considered the issue." *Id.* at 453; *see also id.* at 455-57 (reviewing state and federal jurisdictions which have adopted reasonable suspicion requirement and/or ruled that a parole

[5] In 1985, the Ninth Circuit directly considered and rejected the consent theory espoused in California; foreshadowing *Griffin*, the court of appeals held that the incursion on a parolee's Fourth Amendment rights "is not based on consent" but arises from the "the unique status" and the dual responsibilities of the parole officer. *United States v. Jarrad*, 754 F.2d 1451, 1454 (9th Cir. 1985).

search could not be used by law enforcement as a subterfuge for evading the Fourth Amendment).

The following year, in *Woods*, a different 4-3 majority of the California Supreme Court reversed an appellate court's ruling suppressing evidence which had been seized in a warrantless probation search where police had conducted the search in order to investigate suspected criminal activity by the probationer's boyfriend, with whom she shared her residence. The court upheld the pretextual search of the probationer's residence, reiterating the view that the acceptance of a probation condition sufficed as advance consent to conduct the search, and ruling that the officers' subjective motivation would not invalidate an otherwise lawful probation search.

In dissent, Justice Brown challenged the court's continued reliance on the "consent" rationale, noting that "the consent theory articulated in *People v. Bravo* may be largely moot in light of *People v. Reyes*," which had, perforce, applied an administrative necessity rationale to parolees rather than a consent analysis. *Woods*, 981 P.2d at 1031 (Brown, J., dissenting). Justice Brown also criticized the majority's reliance on a consent rationale because the result was to "reintroduce[] a disparity between parolees and juvenile probationers on the one hand and adult probationers on the other" similar to the one the court sought to eliminate in *Reyes*. In addition, Justice Brown reiterated Justice Kennard's concern in *Reyes* that the court was straying far afield from the numerous state and federal courts who had struck down efforts by police to take advantage of the search condition to conduct criminal investigations unrelated to probation (or, in this case, the probationer). *Id.*

Four of the seven justices on the California Supreme Court have thus recently attacked the coherence of the court's approach to probation search conditions and have challenged the construction of a probationer's consent to a search condition as a blanket waiver of Fourth Amendment rights. *See Reyes*, 968 P.2d at 453-62 (Kennard, Mosk, & Werdegar, J.J., concurring and dissenting); *Woods*, 981 P.2d at 1029-38 (Brown, Kennard, & Mosk, J.J., dissenting). Three justices have specifically questioned the continued vitality of the "consent" rationale as the basis for warrantless searches of a probationer.

The present division between the Ninth Circuit and the state of California regarding the scope

of the probationer's search condition is not untenable. The evolving state of the law in California demonstrates that the distance between the two positions may be short-lived, as California appears poised to modify its own jurisprudence to align more closely to the law of this circuit. The petition for certiorari should be denied and the present conflict allowed to resolve itself.

4. Ninth Circuit Fourth Amendment Jurisprudence is no More Difficult to Enforce Than the Similar Precedents in Force Across the Rest of the Country.

The law in the Ninth Circuit has adhered to the same standard for warrantless probation searches for the last thirty years. Pet. App. 12a-13a ("For at least three decades, it has been the law of this circuit that subterfuge probation searches are unconstitutional."); *see also Smith v. Rhay*, 419 F.2d 160 (9th Cir. 1970) (not a true probation search where search condition used by police to circumvent Fourth Amendment warrant requirement). Federal law in this area is thus substantially more stable and well-defined than California precedents. *See supra* at 10-12 . It should not be so difficult for law enforcement officers to apply this law to determine for themselves whether or not they are embarking upon an investigative search for which the Fourth Amendment requires the issuance of a warrant.

The distinction drawn by the Ninth Circuit is neither complicated nor subtle. The rule is simple: the consent-to-search term of a probation agreement is limited to probationary searches, and not investigatory searches. The Court has identified several objective factors to be taken into account in evaluating whether a search is a true probation search and not an investigative search. For example, the court has identified the probation officer's involvement as one objective factor, although not an essential one, in determining whether a search is a valid probation search.[6] Additional factors

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[6] *See, e.g., United States v. Vought*, 69 F.3d 1498, 1500-01 (9th Cir. 1995) (probation search valid because probation officers decided to conduct search; police did not know about or participate in search); *United States v. Watts*, 67 F.3d 790, 794 (9th Cir. 1995) (probation search valid because probation officer suspected defendant before being contacted by police, and police got involved at probation officer's request); *United States v. Harper*, 928 F.2d 894, 897 (9th Cir. 1991) (probation search valid because probation officer obtained arrest warrant for violation before police contacted her; police accompanied probation officer on search); *United States v. Butcher*, 926 F.2d 811, 815 (9th Cir. 1991) (probation arrest valid because probation officer initiated arrest; police responded to probation officer's request for arrest and were not previously involved in investigating defendant); *United States v. Richardson*, 849 F.2d 439, 441 (9th Cir. 1988) (probation search valid because

this circuit routinely considers include (1) whether the probation officer had independent concerns about possible violations; and (2) who initiated the search, probation or police.[7] The type of search is not necessarily defined by the identity of the actor conducting it; rather, recognizing the overlapping roles of police and probation officers, the court has declined to establish a rigid rule that would validate or invalidate a search based on the title of the searching officer.

Significantly, the various states which make up the Ninth Circuit, apart from California, have all applied versions of the Ninth Circuit's standard for distinguishing between a valid probation search and an investigative search. *See, e.g., State v. Davis*, 891 P.2d 1373, 1378 (Or. Ct. App. 1995) (acceptance of probation search condition does not constitute self-executing, prospective consent to general warrantless search); *State v. Hindman*, 866 P.2d 481, 483 (Or. Ct. App. 1993) (rejecting argument that consent to probation search condition is prospective consent to all police searches; probationer does not waive all Fourth Amendment rights); *State v. Propios*, 879 P.2d 1057, 1062 (Haw. 1994) (not valid probation search where purpose is subterfuge designed to facilitate a criminal investigation); *Roman v. State*, 570 P.2d 1235, 1242 n.20 (Alaska 1977) (broad parole search condition does not authorize searches by police other than at the direction of parole authorities); *Seim v. State*, 590 P.2d 1152, 1155 (Nev. 1979) (affirming distinction between probation search and search conducted for "police investigatory objectives"); *State v. Mongomery*, 566 P.2d 1329 (Ariz. 1977) (probation search should be conducted by probation officer; while Arizona law does not prohibit warrantless probation search conducted by police officers, such expansion of search condition should

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probation officer approved search and obtained warrant to revoke probation before search); *United States v. Merchant*, 760 F.2d 963, 969 (9th Cir. 1985) (search invalid because district attorney did not contact probation officer).

[7] *See, e.g., Vought*, 69 F.3d at 1500 (parole officers conducted first search without police involvement and directed another parole officer to conduct second search); *Watts*, 67 F.3d at 792 (probation officer suspected criminal activity and asked police to conduct search if they were able to locate defendant's residence); *Harper*, 928 F.2d at 897 (parole officer had issued arrest warrant before search); *Butcher*, 926 F.2d at 814 (parole officer initiated search by telling police that defendant had violated parole and was a fugitive); *Richardson*, 849 F.2d at 440 (probation officer told police defendant was in violation when police requested a search, to which probation officers agreed); *Latta v. Fitzharris*, 521 F.2d 246, 247 (9th Cir. 1975) (parole officer initiated and led search because of suspected parole violations).

be rare); *State v. Webb*, 717 P.2d 462 (Ariz. Ct. App. 1985) (probation search must relate to probationary supervision); *State v. Hill*, 666 P.2d 92, 94 (Ariz. Ct. App. 1983) (police may not use probation officer as "stalking horse" for investigatory search); *State v. Matthews*, No. 22875-1-II, 1999 WL 65647 (Wash. Ct. App. Feb. 12, 1999) (parole officers may conduct supervisory searches without warrant but may not act on request of and in concert with law enforcement officials to evade warrant requirement); *State v. Owsley*, 918 P.2d 1231 (Idaho Ct. App. 1996) (even if executed by probation officer, not proper probation search if initiated by police for law enforcement ends); *State v. Burchett*, 921 P. 2d 854, 856-57 (Mont. 1996) (recognizing that probation search condition may not be used by police to evade Fourth Amendment requirement). Thus the practice of law enforcement officers in other jurisdictions is to determine in advance whether the search to be conducted is an investigative as opposed to a true probation search and to obtain a warrant if necessary.

California law enforcement officials who choose not to comply with federal law in this area retain the option of pursuing prosecution in state court. Respondent's case was initially prosecuted in state court, where all of the seized evidence was admissible. It was only on the eve of the state jury trial, when the United States Attorney filed the same case in federal court, that the admissibility of the seized evidence became an issue.

Petitioner contends that the "stalking horse" doctrine is "particularly difficult to apply." Pet. 8. The present case does not raise a "stalking horse" question. It is undisputed, as both reviewing courts have held, that the officer here made no effort to collaborate with the probation office or to contact the probation officer or the sentencing court prior to commencing the search.[8] On these facts, there is no basis for this Court to review the "stalking horse" line of cases cited in the government's petition. *See* Pet. 8 & n.5. Moreover, contrary to the suggestion in the government's petition, the "stalking horse" doctrine is hardly unique to this circuit. As noted above, the large majority of federal

[8] Because the defendant was on "summary probation," no probation officer had been assigned. As the district court noted, in the absence of an assigned probation officer, it is the sentencing judge who retains the power to require supervision of the probationer. Pet. App. 33a (citing *United States v. Merchant*, 760 F.2d 963 (9th Cir. 1984)).

courts, like the other states in the Ninth Circuit, agree that law enforcement officers should be deterred from using a probation officer as a "stalking horse" in situations where the Fourth Amendment requires issuance of a proper warrant.

5. The Decision of the Court of Appeals is Correct.

The decision of the court of appeals in this case falls squarely within established Ninth Circuit law which, as noted above, is not in conflict with any other Circuit, and is not in conflict with any precedents of this Court. The court acknowledged that the Respondent could, and did, consent to a search condition as part of his probation agreement, but also reiterated the established principle that consent to search obtained as a condition of probation is necessarily limited to probation searches, not investigatory searches. Reviewing the facts of the case, as set forth with clarity and particularity by the district court, the court concluded that the district court's determination that the search was an investigatory search, not a true probation search, "was not clearly erroneous. Indeed, it was an almost ineluctable conclusion." Pet. App. 10a.

Petitioner contends that the court of appeals' decision is in error for four reasons. Three of these reasons, however, address issues neither raised by the Respondent nor decided by the court of appeals. *See infra* at 5-6 (discussing Petitioner's arguments 2.a., 2.b., and 2.c). Petitioner thus suggests a misapplication of Constitutional principles where there has been none. As a final argument, Petitioner contends that this Court's ruling in *Whren v. United States*, 517 U.S. 806 (1996), favors rejection of current Ninth Circuit law in favor of California's consent rationale. This argument is unavailing. The instant case does not implicate the concerns of *Whren* because the court did not rely on the officers' subjective motivation to invalidate an otherwise lawful search. Moreover, *Whren* is fully consistent with this circuit's probation search precedents and with the law of all circuits that have invalidated investigatory searches in which police sought to use the probation condition as a subterfuge for evading the warrant requirement. In *Whren*, it was undisputed that the officer had probable cause to stop the vehicle for a traffic violation. 517 U.S. at 817. The defendant challenged the lawfulness of the stop nonetheless, arguing that the Court should apply to traffic stops a standard

higher than the ordinary "probable cause" standard in order to deter police from using traffic stops as a pretext for investigating other criminal activity. *See id.* at 810. In rejecting this argument, the Court refused to find that an otherwise lawful search "that is justifiable on the basis of probable cause" to believe that a crime has occurred would be rendered invalid by the officer's ulterior motives. *See id.* at 811-12. Significantly, the Court noted that those cases which disapproved the use of "pretexts" by law enforcement officers were particularly addressed to situations where the search was conducted without probable cause -- *i.e.*, in cases such as this case. *Id.* "[T]he exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes." *Id.* (emphasis in original); *see also City of Indianapolis v. Edmond*, 121 S.Ct. 447, 456 (2000) (*Whren* holding "expressly distinguished" cases where court addressed the validity of searches conducted in the absence of probable cause). *Whren* thus "reinforces the principle that, while '[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,' programmatic purposes may be relevant to the validity of Fourth Amendment intrusions" in the context of the administrative, investigatory or other "special needs" searches. *Edmond*, 121 S.Ct. at 456 (alteration in original) (quoting *Whren*, 517 U.S. at 813).

CONCLUSION

The decision of the court of appeals is not in conflict with the law of any other circuit, nor is it in conflict with this Court's precedents. The perceived conflict with the State of California may shortly resolve of its own accord. The petition for writ of certiorari should be denied.

Dated: April 16, 2001

Respectfully submitted,

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Assistant Federal Public Defender

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

_____

_____

MARK JAMES KNIGHTS,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

I, ELIZABETH A. COOLEY, hereby certify:

That on April 16, 2001, an OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT in the above-entitled case was deposited in the United States Post Office mail box located in Oakland, California, addressed to the Clerk of the Supreme Court of the United States.

That additional copies of the petition and petitioner's motion were served on counsel for respondent:

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Dated: April 16, 2001

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